

1                   MEMORANDUM OF POINTS AND AUTHORITIES

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3                   1. STATEMENT OF FACTS

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5                 By written order entered August 14, 2008, this Court has granted the motion of

6 Plaintiff and Counterdefendant AT&T Corp. for summary judgment. (Docket No. 130.)

7 This Court found that Plaintiff AT&T Corp. is entitled to judgment on the Complaint of

8 Plaintiff AT&T Corp. (Docket No. 1) against Defendant Dataway Inc. dba Dataway Designs

9 in the sum of \$11,534.67, together with prejudgment interest of \$5.69 per day from

10 September 25, 2006, and Counterclaimant Dataway Inc. dba Dataway Designs is entitled to

11 nothing as a matter of law on the Counterclaim of Counterclaimant Dataway Inc. dba

12 Dataway Designs (Docket No. 31). Notwithstanding the intent evidenced by the order

13 granting summary judgment, the Judgment entered by this Court is silent as to the monetary

14 relief granted to Plaintiff AT&T Corp. on its Complaint (Docket No. 131).<sup>1/</sup>

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16                 2. DISCUSSION

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18                 (A) WHETHER PURSUANT TO RULE 59(e) OR 60(a), THIS COURT HAS

19 THE POWER TO CORRECT OR AMEND ITS JUDGMENT SO THAT IT

20 CONFORMS TO ITS ORDER ON THE MOTION FOR SUMMARY JUDGMENT

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22                 Either on its own initiative or a party's motion, the court is empowered to correct

23 "clerical mistakes" and "errors arising from oversight or omission" in its judgments or

24 Orders. [*F.R.C.P., Rule 60(a).*] A judge may use Rule 60(a) "to make an order reflect the

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28                 <sup>1/</sup>See F.R.C.P., Form 71.

1 actual intentions of the court, plus necessary implications." [*Jones & Guerrero Co., Inc. v.*  
 2 *Sealift Pac.* (9th Cir. 1981) 650 F.2d 1072, 1074.]<sup>2/</sup>

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 4 Rule 60(a) does not allow correction of substantive, or judicial, error: "The basic  
 5 distinction between 'clerical mistakes' (correctable under Rule 60(a)) and mistakes that  
 6 cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution'  
 7 whereas the latter consist of instances where the court changes its mind, either because it  
 8 made a legal or factual mistake in making its original determination, or because on second  
 9 thought it has decided to exercise its discretion in a manner different from the way it was  
 10 exercised in the original determination." [*Blanton v. Anzalone* (9th Cir. 1987) 813 F.2d 1574,  
 11 1577, fn. 2; *see Burton v. Johnson* (10th Cir. 1992) 975 F.2d 690, 694 (Trial court may not  
 12 clarify judgment to reflect a new and subsequent intent).]<sup>3/</sup>

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 14 A Rule 60(a) motion lies to redress, inter alia:

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 16 (1) Error in reciting or transcribing judgment. [*In re Jee* (9th Cir. 1986) 799  
 17 F.2d 532, 535; *Chavez v. Balesh* (5th Cir. 1983) 704 F.2d 774, 776-777; *Allied*  
 18 *Materials Corp. v. Superior Prods. Co., Inc.* (10th Cir. 1980) 620 F.2d 224, 226.]

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 2/ "Judicial error" is distinguished from "clerical error" on the basis of the judge's intent:  
 29 "Judicial error" means the judge knowingly rendered the judgment that is now claimed to  
 30 be erroneous as a matter of law; "clerical error," on the other hand, cannot be attributed to  
 31 the exercise of judicial consideration or discretion and involves errors of oversight or  
 32 omission. [*Jones, Rosen, Wegner & Jones, California Practice Guide: Federal Civil*  
*Trials and Evidence, "Post-Trial Motions,* 20:278-20:278.2.]

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(2) The omission of matter intended to be included in the judgment.

[Hasbrouck v. Texaco, Inc. (9th Cir. 1989) 879 F.2d 632, 636 (Trial court failed to award costs and interest.); Robi v. Five Platters, Inc. (9th Cir. 1990) 918 F.2d 1439, 1445 (Trial Court failed to include registration numbers and dates of issuance on trademarks designated for cancellation, as required by Trademark Office.).]

(3) Computational error. [*Matter of West Texas Mktg. Corp.* (5th Cir. 1994) 12 F.3d 497, 504.]

Errors of a more substantial nature may be corrected by a motion under Rule 59(e). District courts have power to "alter or amend" a judgment by motion under Rule 59(e). [C.P., Rule 59(e).] The motion must seek to "alter or amend" the judgment – This means giving a substantive change of mind by the court, i.e., to correct judicial error as opposed to clerical error. [*Jones, Rosen, Wegner & Jones, California Practice Guide: Federal Civil and Evidence*, "Post-Trial Motions, 20:271.] District courts do not have authority to file a Rule 59(e) motion and they must carefully consider the merits. [*Collins v. Morgan* v. *Dean Witter* (5th Cir. 2000) 224 F.3d 496, 502 (Noting custom of some judges to prohibit litigants from filing motions under Rules 59(e) and 60.)] A substantive motion is one that would result in a substantive alteration of the judgment<sup>#</sup> rather than just a clerical

<sup>4</sup>A postjudgment motion for prejudgment interest (whether an interest award is mandatory or discretionary) involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply: "In deciding if and how much prejudgment interest should be granted, a district court must examine--or in the case of a postjudgment motion, reexamine--matters encompassed within the merits of the underlying action." [*Osterneck v. Ernst & Whitney* (1989) 489 U.S. 169, 175-176, 109 S.Ct. 987, 991-992; *see McCalla v. Royal MacCabees Life Ins. Co.* (9th Cir. 2004) 369 F.3d 1128, 1130-1134; *Webco Industries, Inc. v. Thermatool Corp.* (10th Cir. 2002) 278 F.3d 1120, 1134.] However, where the judgment awards prejudgment interest but does not set the amount, a postjudgment motion to fix the amount is a Rule 60(a) motion to correct "clerical error". [*Pogor v. Makita U.S.A., Inc.* (6th Cir. 1998) 135 F.3d 384, 387.]

1 correction or change in a purely procedural matter. [*United States v. 47 West 644 Route 38,*  
2 *Maple Park, Ill. (7th Cir. 1999) 190 F.3d 781, 782.*] The court's commission of some  
3 manifest error of law or fact justifies the grant of a Rule 59(e) motion. [*Turner v. Burlington*  
4 *Northern Santa Fe R.R. Co. (9th Cir. 2003) 338 F.3d 1058, 1063.*]

5

6 Here, by written order entered August 14, 2008, this Court has granted the motion of  
7 Plaintiff and Counterdefendant AT&T Corp. for summary judgment. This Court found that  
8 Plaintiff AT&T Corp. is entitled to judgment on the Complaint of Plaintiff AT&T Corp.  
9 (Docket No. 1) against Defendant Dataway Inc. dba Dataway Designs in the sum of  
10 \$11,534.67, together with prejudgment interest of \$5.69 per day from September 25, 2006,  
11 and Counterclaimant Dataway Inc. dba Dataway Designs is entitled to nothing as a matter  
12 of law on the Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs (Docket  
13 No. 31). Notwithstanding the intent evidenced by the order granting summary judgment, the  
14 Judgment entered by this Court is silent as to the monetary relief granted to Plaintiff AT&T  
15 Corp. on its Complaint (Docket No. 1).

16

17 In order to correct the obvious omission from the judgment on monetary relief, the  
18 Judgment should be corrected or amended to state: (1) Plaintiff AT&T Corp. is entitled to  
19 judgment on the Complaint of Plaintiff AT&T Corp. against Defendant Dataway Inc. dba  
20 Dataway Designs in the sum of \$11,534.67, together with prejudgment interest of \$3,920.41  
21 (based upon \$5.69 per day from September 25, 2006 through August 14, 2008 [689 days]);  
22 (2) Counterclaimant Dataway Inc. dba Dataway Designs is entitled to nothing on the  
23 Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs; and (3) Costs and  
24 attorney's fees, if any, shall be claimed and contested in accordance with F.R.C.P., Rule  
25 54(d) and Local Rule 54.

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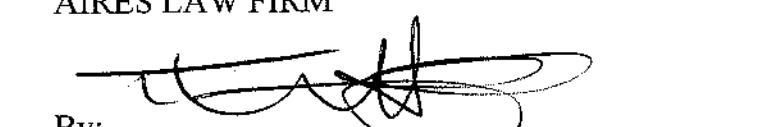
1   3. CONCLUSION

2  
3       For the foregoing reasons, this Court should enter an order correcting judgment or,  
4 alternatively, amending judgment to state: (1) Plaintiff AT&T Corp. is entitled to judgment  
5 on the Complaint of Plaintiff AT&T Corp. against Defendant Dataway Inc. dba Dataway  
6 Designs in the sum of \$11,534.67, together with prejudgment interest of \$3,920.41 (based  
7 upon \$5.69 per day from September 25, 2006 through August 14, 2008 [689 days]); (2)  
8 Counterclaimant Dataway Inc. dba Dataway Designs is entitled to nothing on the  
9 Counterclaim of Counterclaimant Dataway Inc. dba Dataway Designs; and (3) Costs and  
10 attorney's fees, if any, shall be claimed and contested in accordance with F.R.C.P., Rule  
11 54(d) and Local Rule 54.

12  
13 DATED: August 18, 2008

AIRES LAW FIRM

14  
15 By:

16                       
17                     Timothy Carl Aires, Esq.  
18                     Attorney for Plaintiff and Counterdefendant,  
19                     AT&T CORP.

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